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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1307

JOHNNIE MARIE SUMPTER,
Petitioner,

vs.

STATE OF INDIANA,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Indiana to which Mrs. Sumpter's Petition for Writ of Certiorari pertains has now been reported unofficially at 340 N.E. 2d 764.

QUESTIONS PRESENTED

The questions presented by Mrs. Sumpter will be used herein for purposes of structuring this Brief. Objections to certain of the questions will be noted in the appropriate

section of argument. Those questions presented by Mrs. Sumpter are as follows:

1. Is a defendant in a criminal case entitled to trial by jury?
2. Is the double jeopardy standard violated by granting the state another chance to prove a factual element it failed to prove in a first trial?
3. Can a greater punishment be imposed for a lesser offense?
4. Can a greater punishment be imposed upon women, than men, for essentially the same offense?
5. In a criminal case, can the burden of proof ever be constitutionally shifted to the defendant?
6. Does a retrospective application of a new criminal procedure, to a defendant's detriment, offend the *ex post facto* principle?

ARGUMENT

I.

JURY TRIAL WAS NOT REQUIRED

The Petition for Writ of Certiorari attempts to present the issue as one of the right to jury trial generally in situations where factual determinations are to be made. Such an issue is not presented in this case. The Supreme Court of Indiana specifically rejected the concept that the determination of a person's sex, when a relevant issue, was not subject to trial by jury. Pet. p. A-5. Rather, the issue to be considered here is whether there was any factual dispute presented which could be determined by a trier of fact, whether judge or jury. Both the trial court and the Supreme Court of Indiana determined that no such issue was presented.

The procedure provided for in Indiana for determination of sex is that the person's appearance allows the trier of fact to take judicial notice of the person's sex, which notice acts as a rebuttable presumption. Such presumption is sufficient basis for a finding of fact so long as there is no competent rebuttal evidence. If that presumption is actually challenged, then it completely vanishes and is of no evidentiary value. It is improper to inform a jury of such a presumption. Whether the presumption has been rebutted is a question of law. *Sumpter v. State,* 306 N.E.2d 95 (Ind., 1974); *Young v. State,* 258 Ind. 246 (1972). It does not appear that Mrs. Sumpter has at any time in this long and involved litigation presented any claim that she is not of the female sex; the only challenge has been

to the general validity of judicial notice in certain hypothetical situations.

The case is thus similar to the situation presented in *United States ex rel, Heirens v. Pate,* 405 F.2d 449 (7 Cir. 1968) cert. den. 396 U.S. 853 (1969) which case upheld the refusal of a trial judge to have a competency hearing tried by jury "[s]ince no evidence raised a bonafide doubt as to petitioner's competence . . ." 405 F.2d at 451. No substantial federal constitutional issue as to the right to jury trial has been presented.

II.

THE DOUBLE JEOPARDY STANDARD WAS NOT VIOLATED

The argument portion of the Petition for Writ of Certiorari dealing with the double jeopardy provisions of the Fifth and Fourteenth Amendment seems to admit that this Court has consistently ruled that double jeopardy does not occur when a defendant is retried after he successfully appeals an initial conviction, even if that appeal was based upon an insufficiency in the evidence. See Petition, pp. A-3 and A-4, and cases there cited. The proposed distinction is that those cases involved "reversals" of convictions whereas the Supreme Court of Indiana in the first appeal of this case remanded without using the word "reversal." No reason is stated for giving any weight to that distinction, which would appear to be a distinction without a difference.

III.

THE STATUTORY PUNISHMENT IS PROPER

The third issue presented in the Petition for Writ of Certiorari is whether the penalty assessed in this case

constitutes cruel and unusual punishment in that it is more severe than the punishment provided for the offense of keeping a house of ill fame. It might first be noted that the only case cited by Mrs. Sumpter, *Weems v. United States,* 217 U.S. 349 (1910), rests on such an extreme factual base as to be of doubtful precedential value in this matter.

More importantly, though, the assumption that keeping a house of ill fame is "grosser misconduct" (Pet. p. 13) than prostitution is not supported by Indiana law. Those statutes are set forth at pp. 3-4 of the Petition. The statute on keeping a house of ill fame, Indiana Code 35-1-83-2, both on its face and as construed by Indiana courts in the case of *Senst v. State,* 319 N.E. 2d 663 (Ind. App. 1974), involves only the passive action of allowing a house over which one has a right of control to be so used. Thus, the prostitution statute under which Mrs. Sumpter was convicted can reasonably be considered the greater offense.

IV.

NO ISSUE OF SEX DISCRIMINATION IS PRESENT IN THIS CASE

The issue of sex discrimination under the Indiana prostitution statute as it existed at the time of the offense charged in this case is not before the Court at this time. The issue was not considered by the Supreme Court of Indiana in the present appeal. That issue was presented to this Court in the prior appeal, No. 73-1907, and the Motion To Dismiss or Affirm filed therein considered the issues. Those arguments will not be repeated here.

V.

NO BURDEN OF PROOF WAS PLACED UPON DEFENDANT

The procedure adopted in Indiana for determination of the sex of a person allows a rebuttable presumption based upon judicial notice occasioned by the person's appearance. That presumption is adequate to support a finding of the person's sex unless competent evidence to the contrary is presented, at which time the presumption has no further effect or evidentiary weight. Mrs. Sumpter attempts to describe that procedure as placing a burden of proof upon a defendant, which would be contrary to this court's ruling in *Mullaney v. Wilbur*, 419 U.S. 823 (1975).

That argument fails to distinguish between a burden of proof and a burden of presenting evidence. That distinction is noted at fn. 31 of the *Mullaney* opinion, which allows for a shift in the burden of going forward with evidence through the use of a presumption under certain cases. The required strength of the logical connection of the fact presumed to the basis of the presumption, as set forth in *Barnes v. United States*, 412 U.S. 837 at 845-846 (1973), would appear to be amply met in this case.

VI.

THE OPINION OF THE SUPREME COURT OF INDIANA WAS NOT AN EX POST FACTO LAW

It will be assumed here that Mrs. Sumpter is intending to raise a due process issue relating to the retroactive application of a newly annouced doctrine created by a court, since the *ex post facto* doctrine applies only to legislative enactments. *United States v. Wasserman*, 504 F.2d 1012 (5 Cir 1974). This case, however, does not involve a retroactive application in the usual sense of that term,

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since the rule was announced in the very case to which the *ex post facto* claim is made. Were *ex post facto* standards applied there, then many decisions of this Court are also unconstitutional, e.g., *Harris v. New York,* 401 U.S. 222 (1971); *Kirby v. Illinois,* 406 U.S. 682 (1972).

In any event, this case would not run afoul of an *ex post facto* analysis since it involves only a procedural question of the manner of proof unlikely to have any substantial effect on the outcome of the case. Such changes have never been considered improper. *Beazell v. Ohio,* 269 U.S. 167 (1925); *James v. Twomey,* 466 F.2d 718 (7 Cir, 1972).

It might further be noted that there was in fact no change in the law unfavorable to Mrs. Sumpter. Despite the comment of the Supreme Court of Indiana on the first appeal at p. A-22 of the Petition, previous Indiana law allowed proof of sex on a lesser standard of proof. *Howard v. State,* 257 Ind. 166 (1971).

CONCLUSION

For the foregoing reasons, the State of Indiana urges this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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